



# Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108  
phone: 617-727-0060, fax: 617-723-5851



## CONFLICT OF INTEREST OPINION EC-COI-89-6

### FACTS:

Recently, the City Facility Committee (Committee) and ABC, a non-profit corporation, entered into a consultants agreement, whereby ABC agreed to design, staff and execute a study of the facilities of the City, and the Committee agreed to pay ABC a specific fee. Pursuant to the consultants agreement, ABC presented the Committee with a comprehensive plan.

ABC and the Committee are currently negotiating a second agreement which will implement the plan. Although the final terms of this agreement have not yet been determined, a draft contract (Contract) outlines the undertakings of the parties and represents the basic structure by which both parties seek to revitalize facilities of the Committee.

The terms of the contract can be summarized as follows: The Committee will delegate to ABC all of its authority and responsibility for the management, supervision and oversight of the city facilities. ABC will develop curriculum and instruction, including the training, supervision, and evaluation of all personnel. In addition, ABC will conduct hearings; set compensation for employees, subject to all applicable laws and agreements; have authority to recruit, hire, appoint, evaluate, promote, assign, fire, suspend and dismiss employees and consultants; and conduct collective bargaining. The Committee will also delegate to ABC its powers, functions and duties relating to city finances, including the authority to determine expenditures within the total appropriation. Also, ABC will have authority to accept and expend gifts and grants, to prepare budgets, incur liabilities, and make expenditures for the facilities. Furthermore, ABC will prepare the annual budget, apply for and seek funds in the name of the Committee, and make contracts and agreements on behalf of the Committee. Except as provided for in the contract, no vote of the Committee shall be required in order for ABC to exercise any powers delegated to it in the contract.

ABC will provide appropriate resources to undertake the training of employees and will be solely responsible for determining which ABC personnel and resources will be utilized in the implementation of the contract. ABC will provide monthly reports to the Committee and semi-annual reports to the governing body of the city. The Committee will be informed of funding goals, income projections, and budgetary changes.

The Committee retains the following powers in the contract, although it is understood that the final agreement may give the Committee somewhat expanded powers to

override certain ABC decisions. The Committee will receive timely reports from ABC in the implementation of the system. By majority vote, the Committee can require ABC to reconsider (1) the adoption of policies affecting the facilities as a whole, (2) the adoption and submission of the annual budget, (3) the adoption of employee collective bargaining agreements, and (4) new appointments of the administrative officers. ABC shall then reconsider its decision and report its decision after reconsideration, which will be final, except if it involves a matter subject to override.

By two-thirds vote, the Committee will have the power to override acts of ABC regarding the adoption of policies affecting the facilities as a whole; the adoption and submission of the annual budget; and the adoption of collective bargaining agreements. Thus, the Committee will be able to require reconsideration of new appointments but shall not be empowered to override ABC decisions on such matters.

Currently, the contract states that the Committee will indemnify and hold harmless ABC, its officers, trustees, employees and agents from and against all losses, damages, liabilities, costs and expenses. It is our understanding, however, that this clause is subject to change. The Contract as it now stands also provides that ABC employees will not be subject to, among other statutes, the conflict of interest law, G.L. c. 268A.

The parties acknowledge that improvement of the facilities is one of the highest priorities of the city and commit themselves to a good faith effort to increase the available financial resources. If either party believes that insufficient funds will be available in order to carry out the project, they will have the right to terminate the contract upon timely notice and the performance of certain conditions.

The contract will take effect upon its execution and upon adoption of local ordinances and revisions of the city charter. In addition, the General Court must enact enabling legislation.

No individual employed by ABC is specifically named in either the contract or the draft legislation. ABC is empowered to perform the wide variety of functions contemplated in the contract. It is expected that the entire program will be administered by an ad hoc committee. No ABC personnel will assume roles within the facilities. Each ABC employee who works on the project will receive compensation from ABC. Facility employees will receive their compensation from the city.

#### **QUESTION:**

On the basis of the foregoing facts, are ABC employees "municipal employees" or "special municipal employees" under G.L. c. 268A?

#### **ANSWER**

No.

## DISCUSSION:

We note at the outset that the arrangement envisioned by the contract and accompanying legislation is unique in that it delegates virtually all management powers of a municipal agency to a private entity. Because of that uniqueness, the consequent uncertainty as to how the contract will ultimately be performed, and the fact that contract provisions are still subject to change, we stress that this opinion is based solely upon the facts given to us in your recent letters and the contract.

"Municipal employee" is defined as "a person performing services for a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation on a...consultant basis..." G.L. c. 268A, s.1(g). Thus, it will not necessary to be a paid, full-time, city worker in order to fall within the statutory definition of municipal employee." Even uncompensated consultants to city government are "municipal employees" under the conflict law. For example, an architect or engineer who renders professional services directly to a city or town agency would be a "municipal employee." Buss, *The Massachusetts Conflict of Interest Law An Analysis*, 45 B.U. Law Rev. 299,311 (1965).

The Commission has long recognized that a consultant contract between a municipality and a corporation will not render the corporation a "municipal employee." In most instances, employees of such corporations will not come within the statutory definition of "municipal employee." See EC-COI-87-8 (most corporate employees are "too remote" from the municipality to be considered municipal employees); EC-COI-83-129 (employees of corporate consultants not generally considered "municipal employees"). in the municipality specifically targets a certain individual within the corporate structure to perform the services, however, that individual will be. considered a government employee under G.L. c. 268A. See, EC- COI-86-21 (state agency specifically requested corporate employee), 83-129 (state specifically contemplated corporate employee's services and had contractual right to approve replacement). In practical terms, specifically designated employees of a corporation are treated as if they are consultants to a governmental agency and therefore covered by G.L c. 268A.

The contract in this instance mentions no ABC personnel; however, that fact will not always operate to exempt from "municipal employee" status individuals who are nevertheless targeted by the municipality. See EC-COI-87-8 (individual not specified in agreement found to be "municipal employee" as city impliedly contracted for his specific services). Therefore, we must examine the following factors before determining whether a corporate employee not specifically designated in a municipal consulting contract can be considered a "municipal employee":

1. Whether the individual's services are expressly or impliedly contracted for;

2. The type and size of the corporation. For example, an individual who is president, treasurer and sole stockholder of a closely held corporation may be deemed a public employee if the corporation has made a contract with a public agency;
3. The degree of specialized knowledge or expertise required of the service. For example, an individual who performs highly specialized services for a corporation which contracts with a public agency to provide those services may be deemed to be performing services directly to the agency;
4. The extent to which the individual personally performs services under the contract, or controls and directs the terms of the contract or services provided thereunder and,
5. The extent to which the person has performed similar services for the public entity in the past.

EC-COI-87-19; 87-8.

Applying these criteria to the facts as outlined above, we conclude that ABC personnel working on the plan are not "municipal employees"[1]

ABC employs many individuals and operates on a substantial budget. Given the size of ABC and the variety of services which will be provided, there is little likelihood that ABC employees are attempting to hide behind corporate employee status in order to be exempt from the conflict law. Compare EC-COI-87. 8 (sole owner and officer of corporation employing three individuals held to be state employee as his services were impliedly contracted for by the state agency). As this is the first time that the city has contracted for the services contemplated in the agreement, there is no history of actual services rendered upon which the Committee can rely in order to target specific ABC personnel. Although Committee members have developed relationships with certain high- ranking ABC officials through the consultants agreement, we do not find that the Committee has impliedly targeted the services of those particular individuals through the contract. The choice of ABC personnel is within the sole province of ABC; the Committee has no right to override those choices or to demand the services of any specific ABC personnel. Thus, the Committee has not impliedly contracted for the services of any ABC employee.

Although the facts here are unique, the Commission has previously decided one similar question which involved a public entity's delegation of management authority to an outside corporation. We examined the five factors listed above in finding that the facility manager was a governmental employee. EC-COI-87- 19. However, that finding was grounded on the fact that the manager had a history of previous service in the same position with the public enrnty, that he provided a high degree of specialized service, and that the government had specifically contracted for his services. Thus, we require the presence of a number of factors before asserting jurisdiction. The sole factor present in this instance is the high degree of specialized services which will be

performed by as yet undetermined personnel. We do not find that this fact alone will render those individuals "municipal employees."

With this opinion, we do not comment on the wisdom of the plan or its constitutional permissibility. We answer only your immediate question, and use our standard of the need for either an express or implied governmental request for services. Applying that standard to the facts in this case, we find that the Committee has not and cannot designate specific ABC employees for work on the plan. Rather, the Committee has delegated authority to ABC as a corporate entity. Therefore, we conclude that ABC personnel will not be considered municipal or special municipal employees under the conflict law. As stated, this opinion is based on the facts contained in the contract and your earlier letters. Should the performance of the contract lead to results materially different from those contemplated therein, we advise that you renew your request for an opinion based on those facts.[3]

DATE AUTHORIZED: February 8, 1989

[1] By extension, they cannot be considered "special municipal employees," as that term necessarily encompasses only "municipal employees." G.L. c. 268A, s.1(n).

[2] For example, if it has been the expectation of the parties that the plan will be administered by specific individuals, we would need to reconsider our result with respect to those individuals. In such or similar event, we will consider the present opinion as preliminary.